Nos. 20832, 20833 and 20834

In the

United States Court of Appeals

For the Ninth Circuit

JACK ROBERSON and WILLIAM RODGERS, *Appellants*, vs. UNITED STATES OF AMERICA, *Appellee.*	No. 20832
UNITED STATES OF AMERICA, *Appellant*, vs. MERRITT-CHAPMAN & SCOTT CORPORATION, *Appellee.*	No. 20833
MERRITT-CHAPMAN & SCOTT CORPORATION, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee.*	No. 20834

Opening Brief of Merritt-Chapman & Scott Corporation

O'CONNOR, CAVANAGH, ANDERSON,
WESTOVER, KILLINGSWORTH & BESHEARS
By JOHN H. WESTOVER
2727 North Central Avenue
Phoenix, Arizona

Attorneys for Merritt-Chapman & Scott Corporation

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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(For convenience, the Appellants Roberson and Rodgers will be referred to as Plaintiffs and the United States of America will be referred to as the Government. The transcript of record will be referred to as "T.R.", and the transcript of proceedings will be referred to as "T.P.")

JURISDICTION

This action originated in the United States District Court for the District of Arizona. Jurisdiction was established under 28 U.S.C.A. §§ 1346(b), 2674 and 2671. At the close of the Plaintiffs' case, the District Court ordered judgment for the Defendant United States of America (T.R. 74), and by amended judgment of December 6, 1965, dismissed the complaint of the Plaintiffs, also dismissing the third party complaint of the United States of America filed against Merritt-Chapman & Scott Corporation. (T.R. 57)

The Plaintiffs have appealed from the judgment in favor of the United States of America, and have further appealed from the amended findings of fact and conclusions of law dated November 29, 1965. (T.R. 52) The United States of America has appealed the dismissal of the third party complaint, and Merritt-Chapman & Scott Corporation now appeals the amended judgment entered on December 6, 1965, insofar as such judgment fails to adjudicate as a matter of law that Merritt-Chapman & Scott Corporation can in no way be liable to the United States of America for any portion of the judgment, if any, rendered or to be rendered in favor of the Plaintiffs; and that order of the District Court entered August 16, 1965, (T.R. 74) granting the motion of the United States of America to strike those matters designated as "additional defenses" by Merritt-Chapman & Scott Corporation in its answer to the third party complaint of the United States of America. (T.R. 84) The appeals have been consolidated for briefing purposes, and the Appellee and Cross-Appellant Merritt-Chapman & Scott Corporation now submits its single brief opposing the appeal of the United States of America, numbered 28033; in support of its appeal against the United States of America, numbered 20834; and pursuant to Rule

74 of the Federal Rules of Civil Procedure in opposition to the appeal of Plaintiffs-Appellants, numbered 20832.

SUMMARY OF ARGUMENT

The court erred in granting the motion to strike Third Party Defendant Merritt-Chapman & Scott Corporation's "additional defenses", and erred in failing to enter judgment on behalf of Third Party Defendant for the following reasons:

A. The appeal of the Plaintiffs-Appellants and therefore the appeal of the Government must fail, since the Government owed no duty to the Plaintiffs-Appellants upon which liability for negligence can be predicated.

B. Merritt-Chapman & Scott Corporation cannot be liable to the Plaintiffs because of its immunity from suit by the Plaintiffs-Appellants. The Government, having paid for the Workmen's Compensation Insurance giving rise to Merritt-Chapman & Scott Corporation's immunity, is entitled to the same immunity.

C. The Government cannot recover from Merritt-Chapman & Scott Corporation on a theory of common law indemnity.

D. Under the Workmen's Compensation Act of the State of Arizona, Merritt-Chapman & Scott Corporation is immune from suit by its employees, and such immunity prohibits any action by the Government against Merritt-Chapman & Scott Corporation based upon injuries to the employees of Merritt-Chapman & Scott Corporation.

E. No specific contract of indemnity against the negligence of the Government existed between the Government and Merritt-Chapman & Scott Corporation, and there is no indemnity against the negligence of an indemnitee except when the same is specifically expressed by contract.

F. The contract between the Government and Merritt-Chapman & Scott Corporation cannot be construed so as to give rise to an implied warranty indemnifying the Government against its own negligence.

ARGUMENTS

A. THE APPEAL OF THE PLAINTIFFS-APPELLANTS AND, THEREFORE, THE APPEAL OF THE GOVERNMENT MUST FAIL, SINCE THE GOVERNMENT OWED NO DUTY TO THE PLAINTIFFS-APPELLANTS UPON WHICH LIABILITY FOR NEGLIGENCE CAN BE PREDICATED.

It is necessary before considering the question of indemnity between Merritt-Chapman & Scott Corporation and the Government to consider the asserted liability on the part of the United States. In this case recovery was sought against the United States solely because of the negligence of the Government and not by virtue of the negligence of Merritt-Chapman & Scott Corporation having been imputed to the Government.

By looking to the final argument of Plaintiffs' counsel, we can determine exactly the theory of the Plaintiffs against the Government. The argument of Plaintiffs' counsel commences at page 436 of the transcript. There Plaintiffs' counsel indicated that Plaintiffs' theory was based upon the proposition that the Government had undertaken a duty to supervise safety and it failed in the performance of the duty of supervising safety. (Page 436, lines 20 and 23; page 437, lines 10-13; page 439, lines 8-12; page 441, lines 4-5 and lines 13-17; page 444, lines 5-16). The court desired to insure that it was aware of Plaintiffs' contention and gave Plaintiffs' counsel an opportunity to dispel any misapprehension that the court might have. The court said at page 446:

> "As I understand Mr. Wilmer's position, and he may correct me if I am wrong, it is that assuming there was no duty on the part of the United States to conduct

any kind of safety inspection program, or anything of that nature, once they undertook to conduct such a safety program, his position is that they failed to conduct it properly and that failure resulted proximately in the injuries to the plaintiffs, whether it be through the pin or the lack of a guardrail."

To further assure there would be no mistake, the following exchange took place between Plaintiffs' counsel and the court at page 447:

"The Court: Did I misunderstand you in my statement?

Mr. Wilmer: No, that is exactly correct, your Honor."

Similarly, examination of the brief of the Plaintiffs-Appellants reveals that the Plaintiffs seek to hold the Government liable for negligence not because of a non-delegable duty to provide a safe place to work, not because of any vicarious liability imposed on account of the acts of employees of Merritt-Chapman & Scott Corporation, not on account of the Government's mere ownership of the premises, but on account of the affirmative actions of employees of the United States Government.

It therefore is perfectly clear that the grounds for liability asserted by Plaintiffs against the Federal Government is the claimed negligence of the Government employees in failing to properly conduct a safety program, entered upon voluntarily.

In *Kirk v. United States,* 270 F.2d 110 (9th Cir. 1959), it appears that the liability of the Government has been dispositively decided against the Plaintiffs herein and in favor of the Government.

There are few situations in which a court is presented with a case on all fours with the issue at hand. Kirk seems indistinguishable both legally and factually. The amazing

similarity of the factual pattern disclosed by Kirk and that disclosed by the case at hand merits a somewhat lengthy exploration of the facts of Kirk. The Ninth Circuit in setting forth the factual basis of its decision in Kirk delineated a picture which, were it not for the difference in the names of the plaintiff and the name of the dam involved, could well serve as the recitation of the statement of the facts in this case. The factual situation disclosed by Kirk was:

> "The appellants are the widow and minor child of William A. Kirk, who lost his life when he fell from a scaffold upon which he was working as a carpenter during the construction of the Lucky Peak Dam on the Boise River in Idaho . . .
>
> The control works at the outlet of the dam were being constructed in accordance with plans and specifications prepared by the Department of the Army, Corps of Engineers, under a contract between the United States and Bruce Construction Company and Russ Mitchell, Inc., independent contractors. *Kirk was employed by the contractors as a carpenter and he was not an employee of the United States.*
>
> . . . On the date of the accident . . . Kirk was still engaged in removing the last she-bolt . . . the structure collapsed at the point where the two panels were joined, plunging Kirk into the river . . .
>
> . . . The contract under which the control works at the outlet of the dam was being constructed is typical of contracts used by the Corps of Engineers in the construction of flood control and related projects . . . The employees of Kirk were required to furnish the materials and perform the work for completion of the dam 'in strict accordance with specifications, schedules, drawings and conditions . . .' Under the contract all material and workmanship is subject to inspection, examination and tests by representatives of the *contracting officer* at any and all times during the manu-

facture and/or construction, and the United States retains the right to reject defective material and workmanship or require its correction." (Emphasis added). (270 F.2d 111-113)

Article 30 of the contract is an almost verbatim reiteration of the accident prevention provisions contained in the contract involved in the case at hand and are substantially the provisions contained in paragraphs 7 and 8 of the general provisions of the contract herein. See *Kirk v. United* States, 270 F.2d 110 at 113-116, and compare with Contract No. 14-06-0-2403, Exhibit A. to Defendant's Answer. (T.R. 12)

The plaintiffs' contention in Kirk was basically that asserted against the Government in the case at hand, to-wit, that the United States was under a duty to the plaintiffs to properly inspect and carry out the provisions of the safety regulations which it voluntarily entered upon. See *Kirk,* supra, at 117, 118 and paragraphs 5, 6, and 7 of the first cause of action of the plaintiffs' complaint herein as reincorporated in the same paragraphs of the second cause of action. (T.R. 1)

As was pointed out by Judge Jertberg, speaking for the Ninth Circuit:

> "The fatal weakness of appellants' position, as we see the problem, is that appellants have utterly failed to establish the existence of the legal *duty* upon which they rely." (270 F.2d 117) (Emphasis added)

In so holding, Judge Jertberg, in an able synthesis of the cases and legislative history, held:

> *"While this statute clearly authorizes the execution of the contract on behalf of the United States, we are unable to find therein any intent, expressed or implied, on the part of Congress to establish a duty of care*

> *on behalf of the United States toward employees of an independent contractor, or to authorize the creation of such duty by the Secretary of the Army or the Chief of Engineers through the issuance of regulations, manuals or directives. The statute is silent as to the creation of any duty of care on the part of the United States toward the class of which Kirk was a member* . . . If the United States is to be made liable to the employees of independent contractors engaged in the construction of a project under the jurisdiction of the Department of the Army, (and the Bureau of Reclamation of the Department of the Interior in this case is legally indistinguishable therefrom) such liability must be created by legislative act and not be judicial fiat." (270 F.2d 117) (Parenthetical comment ours) (Emphasis added)

The Ninth Circuit went on to hold that mere voluntary assumption of a program of accident prevention, even though provided for in the contract (and provided for in the identical language which the court must here construe) no liability and no duty on the part of the Government to employees of independent contractors arises as a result thereof. The crucial reasoning of the Ninth Circuit as applied to the lack of duty on the part of the Government was expressed in 270 F.2d 118, as follows:

> "The voluntary assumption of such a program [accident prevention and safety program] for the welfare of all parties concerned should not create liability on the part of the defendant to the employees of contractors where the performance, or failure to perform, *in no wise increases the hazard to the employees of the contractor beyond that which would otherwise have been present.*" (Emphasis added)

The language above emphasized expresses with clarity the test of the duty which the Government owes, if any, to

employees of an independent contractor performing work under a contract for the Government, even though the contract provides for the accident and safety program. Applying this test to the case at hand it is immediately apparent that the Government had no duty to the Plaintiff herein, and thus the Third Party Defendant Merritt-Chapman & Scott Corporation cannot be subjected to derivative liability to the Government, as the safety program contained in the contract in both Kirk and this case created no hazard to the Plaintiffs Jack Roberson and William Rodgers, herein, beyond that which would otherwise have been present. Thus the Government owing no liability under the contract to the Plaintiffs, it may not assert any right of indemnity against Merritt-Chapman & Scott Corporation.

But of greater importance is the fact that it is inherent in both the language and legal conclusion expressed in *Kirk,* supra, that if the contract creates no liability on the part of the Government to employees of a contractor, the clause in the contract construed to place no duty upon the Government toward employees of the contractor, can certainly not be said to create any duty or liability from the contractor to the Government.

A provision of a contract such as discussed in *Kirk* and with which the court is here faced does not create a duty to those who are "incidentally benefited" if the contract provisions are properly performed, nor toward those who may be "incidentally injured" if they, the contract provisions, are not properly performed. It cannot be said to place any duty or responsibility, as a matter of law, on the Government, vis-a-vis *Kirk.* Thus, if the insertion of these rules, regulations, manuals and directives into the contract, as pointed out by the Ninth Circuit, are *merely provisions to secure the safety and welfare of the public as an entity,* as a matter of law they do not establish a civil liability either

on the part of the Government or on the part of the other party to the contract, in this instance Merritt-Chapman & Scott Corporation.

In addition to the language contained in the contract discussed in *Kirk,* we have an even clearer expression of this principle in the contract with which the court is faced in this instance. In paragraph 10 of the General Conditions of the contract it is expressly provided:

> "nothing in this paragraph shall be construed to permit the enforcement of any laws, codes, or regulations herein specified by any except the contracting officer." (T.R. 12)

Is the contracting officer seeking to "enforce" them in this lawsuit? Certainly not. The contracting officer is not seeking to enforce them on behalf of the plaintiffs. Nor is the contracting officer seeking to enforce them in the third party complaint filed herein by the Government. The clear and only purpose of the provisions of the contract safety manuals, etc. is merely for the purpose of reducing the risks to the public generally and to permit the contracting officer general safety supervision over the project for the protection of the public as an entity and not for the protection of the plaintiffs herein. See *Kirk v. U.S.,* supra, 270 F.2d 110, at 117.

In the recent case decided by the Tenth Circuit, *U. S. v. Page,* 350 F.2d 28 (10th Cir. 1965), *Cert. denied,* 382 U.S. 979 (1966), the trial court held the Government liable for failure to properly supervise safety practices, for failure to prescribe safety practices and for failure to properly inspect the Government property. The court, speaking through Judge Seth, reversed stating:

> "The fact that the contract may have reserved to the United States the right to inspect the work and facilities of the independent contractor, and the right to stop the work, does not in itself override or alter the general rule of non-liability for the torts of the contractor because *no duty* is created *to employees or third parties.*" (350 F.2d 30) (Emphasis added)

By identical construction of the instant contract, it must be said that the following provision creates *no* duty to the Government:

> "He (the contractor) shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work." (General Provisions paragraph 9) (T.R. 12)

If the Government contends this paragraph creates a duty by the contractor to the Government, it should specify what duty is contended to have been created and what words create such a duty.

Page goes on to say:

> "The fact that the work and duties of the independent contractor and of his employees originate in a contract, in plans, or regulations issued by the Government does not create a duty by it to employees where there was not such an affirmative control and direction by Government officials over the employees or interference in the work of the contractor as to create conditions where there was in fact no independent contractor." (350 F.2d 31)

Additional cases holding a lack of duty prohibits any such claim as is asserted here are:

Strangi v. U. S., 211 F.2d 305 (5th Cir. 1954);
Hopson v. U.S., 136 F.Supp. 804 (W.D. Ark. 1956);
U. S. v. Hull, 195 F.2d 64, 67 (1st Cir. 1952);
Nyquist v. U.S., 226 F.Supp. 884 (D. Mont. 1964).

Let us now look to the remainder of the record to determine if any obligation exists on the part of Merritt-Chapman & Scott Corporation to indemnify the Federal Government for the negligent conduct of Government employees.

B. MERRITT-CHAPMAN & SCOTT CORPORATION CANNOT BE LIABLE TO THE PLAINTIFFS BECAUSE OF ITS IMMUNITY FROM SUIT BY THE PLAINTIFFS-APPELLANTS. THE GOVERNMENT, HAVING PAID FOR THE WORKMEN'S COMPENSATION INSURANCE GIVING RISE TO MERRITT-CHAPMAN & SCOTT CORPORATION'S IMMUNITY, IS ENTITLED TO THE SAME IMMUNITY.

Merritt-Chapman & Scott Corporation, having complied with the Workmen's Compensation Act of the law of Arizona, is immune from liability to the Plaintiffs-Appellants. Arizona Revised Statutes Secs. 23-1022(a) and 23-906(a) (1956). Turning to the factual pattern of the instant case, Merritt-Chapman & Scott Corporation obtained Workmen's Compensation Insurance by virtue of its agreement to do so in its contract with the Government. The Government wished Merritt-Chapman & Scott Corporation to provide for injuries to employees, and therefore required Merritt-Chapman & Scott Corporation to obtain Workmen's Compensation Insurance, absorbing the costs of same as a part of the contract price. Therefore, the Government has paid for the cost of providing Workmen's Compensation Insurance for the benefit of the Plaintiffs-Appellants. It is now being asked to respond in damages following recovery by the Plaintiffs-Appellants from the Workmen's Compensation fund provided by their employers and paid for by the Government. The Government having paid to provide a fund out of which the Plaintiffs-Appellants might recover, and the Plaintiffs-Appellants having taken advantage of that fund, should the Government now have to respond in damages for the same injuries? Extension of the immunity

derived from compliance with the Workmen's Compensation laws beyond the employer of the injured party has been considered by a great number of courts, and certain general rules have evolved as a result. As a general rule, a general contractor is immune from suit by an employee of a subcontractor, when the subcontractor is uninsured, on the theory that the general contractor thereby becomes the "statutory employer", making applicable the exclusive remedy provisions of the Workmen's Compensation Acts. 2 *Larson's Workmen's Compensation Law*, Sec. 72.31, (1961), and cases cited therein. That this immunity should extend to the contractor even though the subcontractor obtains insurance can be effectively argued. As stated by Larson:

> "In one sense, this is rather harsh on the general contractor. The object of the 'contractor-under' statutes is to give the general contractor an incentive to require subcontractors to carry insurance. But if the general contractor does conscientiously insist on this insurance, his reward, under these cases, is loss of exemption from third party suit. A sounder result would seem to be a holding that the overall responsibility of the general contractor for getting sub-contractors insured, and his latent liability for compensation if he does not, should be sufficient to remove him from the category of 'third party'." (2 Larson's Workmen's Compensation Law, Sec. 72.31, p. 176)

The logical policy argued for in the text is to extend the immunity to include the party who insists upon compliance with Workmen's Compensation laws, and thereby assures an injured workman of a speedy and adequate remedy unfettered by the defenses available in a common law action. Even more so should this reasoning apply to the Government in the instant case, since the Government demanded compensation coverage, and necessarily thereby

paid for same in the contract price. A number of jurisdictions, proceeding on the theory that all of those who contribute to the compensation fund should be immune from actions brought by injured employees, have extended the immunity to the entire "compensation family", extending varying degrees of immunity to persons other than the employer. *Ala. Code Ann.* §§ 7586 and 7587 (1940) (restricting liability of third party-contributor to amount of compensation payable); La. Rev. Stat. § 23-1021 et seq. (1950), as interpreted in *Maddox v. Aetna Casualty & Surety Company,* 259 F.2d 51 (5th Cir. 1958). Taking particular note of the policy of Workmen's Compensation laws to fairly compensate injured workmen without burdening the beneficiaries of the acts by application of the defenses available in common law negligence actions, it is evident and equitable that a party providing for payments to the compensation fund should receive the benefit of the exclusive remedy provisions.

While the Government in the instant case admittedly is not a "statutory employer" claiming immunity on that basis, it is clear that the Government has paid for Workmen's Compensation coverage, and that the Plaintiffs have received the benefits thereof. Therefore, justice dictates that the Government should not now be subject to a common law negligence action based upon the compensated injuries.

C. THE GOVERNMENT CANNOT RECOVER FROM MERRITT-CHAPMAN & SCOTT CORPORATION ON A THEORY OF COMMON LAW INDEMNITY.

The Government cannot avoid the consequences of its own negligence by characterizing the same as "secondary" or "passive" as opposed to "primary" or "active" negligence on the part of Merritt-Chapman & Scott.

The claim of the Plaintiff herein against the Government is in the nature of a common law negligence action. The

theory of a common law indemnity action is that one who, without personal fault, has been compelled to respond in damages to a Plaintiff, may recover from another whose wrongful conduct was the proximate cause of the Plaintiff's injuries. In *Busy Bee Buffet v. Ferrell,* 82 Ariz. 192, 310 P.2d 817 (1957), the Supreme Court of Arizona affirmed this principle. In that case, the Plaintiff fell through a trap door on premises occupied by the Buffet, the trap door having been left open by Pastis, a co-tenant of the building. The court affirmed a judgment over in favor of the Buffet against Pastis, finding that the Buffet's liability to the Plaintiff was merely the result of its breach of a legal duty to maintain the premises in a reasonably safe condition for the use of its business invitees. The court found that, in breaching its duty to the Plaintiff:

> "The Buffet was guilty of no active fault in creating the danger to Ferrell. Its negligence was passive or static. Its negligence was incapable of producing injury to anyone at that time except through the active negligence of another. Pastis, in opening the trap door and leaving it unguarded, was the immediate cause of Ferrell falling through the opening and sustaining the injuries which form the basis of this litigation." (310 P.2d 820-821)

A discussion of common law indemnity in Arizona is contained in a recent article in the Arizona Law Review. See Sherk: *Common Law Indemnity Among Joint Tort Feasors,* 7 Ariz. L. Rev. 59 (1965).

The author, after reviewing the Arizona decisions, states at pp. 69-70:

> "It seems safe to conclude, therefore, that Arizona follows the majority rule and restricts the right of indemnity . . . and will continue to deny indemnity to a tort feasor who is actually concurrently negligent in

> producing a plaintiff's injury. Thus, any negligent act or omission actually committed by the 'passively negligent' indemnitee himself, whether committed before, at the same time or after the 'actively negligent' joint tort feasor acts, should preclude the former's right to indemnity in an Arizona court."

In *Slattery v. Marra Brothers,* 186 F.2d 134 (2nd Cir. 1951), the court said, after conceding that a difference in the gravity in fault would allow indemnity in a proper case:

> "We cannot, however, agree that that result is rationally possible, except upon the assumption that both parties are liable to the same person for the joint wrong." (186 F.2d 139)

Any characterization of the Government's negligence as "static", "passive", "technical" or "secondary", which might induce a court in an ordinary case to apply the "primary-secondary" principle, is entirely inappropriate in the present case, inasmuch as the entire theory of the Plaintiff's case is predicated upon the active negligence of the Government. Furthermore, the "common liability" requisite of such cases is wholly absent from the present controversy. The entire duty presented by Merritt-Chapman & Scott Corporation to the Plaintiff is defined by the terms of the Workmen's Compensation Acts of the State of Arizona, making it impossible for Merritt-Chapman & Scott Corporation to be subject to a common law negligence action by the Plaintiff, thereby negativing the common liability upon which an indemnity action must be based.

Merritt-Chapman & Scott Corporation, as required by Section 10 of the General Conditions of the contract and Section 4-14 of the Bureau of Reclamation publication, "Safety Requirements for Construction by Contract", has provided "the contracting officer or his authorized representative with certificates of insurance prior to the start

of operations indicating full compliance with certificates of insurance prior to the start of operations indicating full compliance with the state Workmen's Compensation statutes." (United States Department of the Interior, Bureau of Reclamation: Safety Requirements for Construction by Contract, 3rd ed. (1962) Sec. 4-14) (Incorporated in Contract No. 14-06-0-2403 by Section 10, General Conditions, thereof) (T.R. 12). The Workmen's Compensation Act of the State of Arizona defines the nature of an employer's duty toward its employees relative to claims for personal injuries. Merritt-Chapman & Scott Corporation was subject to this claim, and this claim only, relative to injuries sustained by the Plaintiffs.

In *Slechta v. Great Northern Railway Company*, 189 F. Supp. 699 (N.D. Iowa, W.D. 1961), *affirmed*, 350 F.2d 917 (4th Cor. 1965) the court enunciated the basis upon which a negligent party can seek indemnity from another alleged to be primarily responsible. Even while espousing an indemnity rule which may be broader than that allowed in Arizona, the court then explained why a negligent indemnitee's claim against *an employer, subject to Workmen's Compensation laws*, must fail:

> "Though both are at fault with respect to the injured plaintiff, if the negligence of one is passive while that of the other is active, indemnity will lie against him whose negligence is active. However, there can be no common liability to the employee when the liability of the employer is governed by the terms of the Workmen's Compensation Act and the liability of the third party is based on common law negligence. American District Telegraph Co. v. Kittleson, supra. When the injured party cannot proceed against one of the joint tort feasors because of some personal defense that party might have, there is no common liability existing between the alleged joint tort feasors. (Citing cases)

Consequently, when the employee cannot proceed against his employer in an action for damages because his employer is protected from such action by a Workmen's Compensation Act, there is no common liability between the employer and the third party to the employee, and no right to the indemnity that requires a common liability." (189 F. Supp. 702-703) (Emphasis added)

As stated generally in 2 Larson: *Workmen's Compensation Law,* Sec. 76.21 (1961), p. 231:

"The liability that rests upon the employer is an absolute liability irrespective of negligence, and this is the only kind of liability that can devolve upon him whether he is negligent or not. The claim of the employee against the employer is solely for statutory benefits; his claim against the third person is for damages. The two are different in kind and cannot result in a common liability."

The court in *Johnson v. United States,* 133 F. Supp. 613, (E.D. N.C. 1955) stated:

". . . any notion that the third party, who is sued for damages for negligently inflicting a compensable injury upon the employee, can require the employer to pay a part of such damages by way of contribution under G. S. 1-240 or all of them by way of indemnity under the doctrine of primary and secondary liability is absolutely incompatible with the plain provision of G. S. 97-10, relieving the employer from all liability to the employee on account of the injury except that of paying compensation to him in accordance with the provisions of the Workmen's Compensation Act." (133 F. Supp. 614)

The court continued, acknowledging the argument of the employer-third party defendant:

"It is true, as contended, that under the allegations of the complaint if plaintiff prevails it must be upon a

finding of negligence of the defendant, as to which the contract affords no protection, while, if plaintiffs fail to recover, there, of course, would be no basis for action over against the third party defendant." (133 F. Supp. 615)

D. UNDER THE WORKMEN'S COMPENSATION ACT OF THE STATE OF ARIZONA, MERRITT-CHAPMAN & SCOTT CORPORATION IS IMMUNE FROM SUIT BY ITS EMPLOYEES, AND SUCH IMMUNITY PROHIBITS ANY ACTION BY THE GOVERNMENT AGAINST MERRITT-CHAPMAN & SCOTT CORPORATION BASED UPON INJURIES TO THE EMPLOYEES OF MERRITT-CHAPMAN & SCOTT CORPORATION.

An employee's exclusive remedy against his employer is spelled out in the following statutory language:

> "The right to recover compensation pursuant to the provisions of this chapter for injuries sustained by an employee shall be the exclusive remedy against the employer, except as provided by Sections 23-906 and 23-964 . . ." (Ariz. Rev. Stat. Ann. 23-1022(a) (1956))

Sections 23-906 and 23-964 concern themselves with an employer's failure to comply with the provisions of the act; no issue has been raised in this proceeding concerning the compliance of Merritt-Chapman & Scott Corporation with the terms of the act.

While Section 23-1022(a), quoted above, can be construed so as to limit the employer's liability only as to actions brought by or on behalf of the employee, Section 23-906 concerns itself precisely with the total obligation of the employer, as opposed to dealing with the exclusive remedy of the employee. The section states:

> "Employers who comply with the provisions of Section 23-961 as to securing compensation shall not be liable for damages at common law or by statute, *except as provided in this section,* for injury or death of an employee wherever occurring, . . ." (Ariz. Rev. Stat. Sec. 23-906(a) (1956)) (Emphasis added)

The most obvious reason for denying the relief sought by the Government from Merritt-Chapman & Scott Cor-

poration is contained in the decision of the Supreme Court of California, sitting en banc, in *Popejoy v. Hannon,* 37 Cal. 2d 159, 231 P.2d 484 (1951). The Court said:

> "Popejoy's recovery against the Hannons for the negligence of Sugarman, who would be liable to them, is therefore an indirect recovery of damages from the plaintiff's employer, whose sole liability is that imposed by the provisions of the Workmen's Compensation Act. This is contrary to the purpose and public policy of that statute." (231 P.2d 492)

The California courts have subsequently referred to this decision in *Southern California Gas Co. v. A.B.C. Construction Co.,* 204 Cal. App. 2d 747, 22 Cal. Rptr. 540 (Cal. App. 1962), as follows:

> "Another rule is present which eliminates any liability of defendant under the fourth cause of action. Plaintiff paid $90,000 to two of defendant's workmen in settlement of their personal injury claims arising out of the explosion; it is admitted that the two men injured were employees of defendant acting within the scope of their employment.
>
> The right to recover compensation under the Workmen's Compensation Act is the exclusive remedy against the employer (see former section 3601, Labor Code, in effect when the instant action was filed). To permit plaintiff to recover here on the fourth cause of action would be an indirect recovery of damages for the personal injuries sustained by the two employees as against the defendant employer, whose sole liability is that imposed by the Workmen's Compensation Act. This is contrary to the public policy of the statute (see *Popejoy v. Hannon,* 37 Cal. 2d 159, 172-173, 231 P.2d 484).
>
> It has already been pointed out that plaintiff's suit is not, and cannot be, based upon any contract or agreement of defendant for indemnification of plaintiff." (22 Cal. Rptr. 544)

This rule was so well ingrained in California that when a building maintenance company's employee brought suit against a school district, as a result of which the school district filed a third party complaint against the employer, and the opinion in that case suggested there might be some right to indemnity from the employer on the basis of a breach of contract or implied indemnity, the Legislature promptly rewrote the law so as to preclude such indemnity. See *City of Sacramento v. Superior Court,* 205 Cal. App. 2d 398, 23 Cal. Rptr. 43, 47 (Cal. App. 1962).

In *Halstead v. Norfolk & Western Railway Company,* 236 F. Supp. 182 (S. D. W. Va. 1964), *affirmed,* 350 F.2d 917 (4th Cir. 1965) the Court said:

> "Black Rock having already paid its contribution to the Workmen's Compensation Fund and the plaintiff having received the benefits thereof, before fostering a further economic burden on Black Rock, for the same industrial accident to its employee, its legal responsibility therefore must be made to clearly appear." (236 F. Supp. 187)

Admitting a contractual relationship between the Government and Merritt-Chapman & Scott Corporation, but recognizing that the contract between the parties contains no language amounting to an express indemnity against the Government's own negligence, the language of *Royal Indemnity Company v. Southern California Petroleum Corporation,* 67 N.M. 137, 353 P.2d 358 (1960) becomes particularly appropriate.

The Court outlined the problem succinctly as follows:

> "To be more specific, the question becomes: Is the exclusive remedy provision of the Workmen's Compensation Act so broad as to grant amnesty to an employer for all causes of action relating to employees' injuries, regardless of the question of independent breach of duty, where there is no express contract of indemnity?" (353 P.2d 360)

At page 361 the Court says:

> "Southern California urges that B. J. Service, by its contract, impliedly agreed to do its work without negligence and is therefore liable or must indemnify for the damage proximately caused by its negligence. As to such basic contentions, we do not feel there need be any discussion. However, the next step in the argument is the determinative one. This is: That assuming liability for negligence, and, therefore, indemnity, under the contract, that injuries to employees of B. J. Service are a recoverable item of damage. This assertion has support in several jurisdictions, on the theory that when the employer breaches an independent duty toward the third party, he has an obligation to indemnify. (*American District Telegraph Co. v. Kittleson,* 8 Cir., 1950, 179 F.2d 946; *Rich v. United States,* 2 Cir., 1949, 177 F.2d 688; *Westchester Lighting Co. v. Westchester Co. S. E. Corp.,* 1938, 278 N.Y. 175, 15 N.E.2d 567; *San Francisco Unified School Dist. v. California Bldg. Main. Co.,* 1958, 162 Cal. App. 2d 434, 328 P.2d 785; *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L.Ed. 133) However, none of the statutes construed contained such explicit, definite language as does the New Mexico act, and this is true particularly as to the Ryan case, supra, in which the Supreme Court of the United States construed the provisions of the Longshoremen's Act."

The Court said at page 362:

> "(1) The use of the words in the section of the statute, supra, 'any employer . . . shall not be subject to any other liability whatsoever . . . and all causes of action, actions at law, suits in equity, and proceedings whatever, and all statutory and common-law rights and remedies . . . are hereby abolished . . .' expressly limits the liability of the employer and destroys the common-law right of indemnity.

(2) Whether or not a different rule might be applied in a case where an employer and a third party had specifically contracted for indemnity, we need not here decide. Suffice it to say that in this case, where reliance is placed upon an implied agreement, we do not feel that the position of Southern California can be sustained as against the strong language of Sec. 59-10-5, supra. If such an agreement to indemnify were to be implied, the employer would be obligated to pay damages to an injured employee, through a third party, over and above the amount of compensation fixed by the Act, and thus impose the very liability against which the Act declared the employer should be insulated. This does not appear to be the legislative intention, and the court would not by decision alter the plain, clear language of the legislative enactment.

We therefore conclude that the trial court correctly dismissed the third-party complaints."

In *United Air Lines v. Wiener,* 335 F.2d 379 (9th Cir. 1964), *Cert. denied,* 379 U.S. 951 (1964), the Federal Employees' Compensation Act, 5 U.S.C.A. Sec. 757(b), was held to preclude an otherwise existing right of indemnity with respect to Government employees killed in a mid-air plane collision because of the exclusive liability provision of the Compensation Act.

In *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 98 L. Ed. 143, 74 S. Ct. 202 (1953), the Plaintiff was an employee of a ship repairing firm who brought suit against the ship owner. By third party complaint, the ship owner sought contribution or indemnity from the ship repairing firm. The Supreme Court held:

"Pope & Talbot's (the ship owner seeking indemnity) contention if accepted would frustrate this purpose to protect employers who are subject to absolute liability by the act. Moreover, reduction of Pope & Talbot's

liability at the expense of Hawn (the employer) would be the substantial equivalent of contribution which we declined to require in the Halcyon case." (98 L. Ed. 152) (parenthetical material ours)

The court would not allow contribution or indemnity from the employer.

To allow indemnity from Merritt-Chapman & Scott Corporation would frustrate the purpose of the Arizona Workmen's Compensation Act by allowing a second recovery against Merritt-Chapman & Scott Corporation following compliance with the Act.

E. NO SPECIFIC CONTRACT OF INDEMNITY AGAINST THE NEGLIGENCE OF THE GOVERNMENT EXISTED BETWEEN THE GOVERNMENT AND MERRITT-CHAPMAN & SCOTT CORPORATION, AND THERE IS NO INDEMNITY AGAINST THE NEGLIGENCE OF AN INDEMNITEE, EXCEPT WHEN THE SAME IS SPECIFICALLY EXPRESSED BY CONTRACT.

There is absolutely no language in the contract between the Government and Merritt-Chapman & Scott Corporation which could give rise to an express indemnity by Merritt-Chapman & Scott Corporation to indemnify the Government for its own negligence. The Government has predicated its claim of indemnity upon the following contract provisions: Paragraph 10, "General Conditions;" Paragraph 10, "General Provisions;" and Paragraph 11, "General Provisions," Contract No. 14-06-0-2403. (T.R. 12)

Paragraph 10 of the General Conditions provides:

> "*Accident prevention.* The contractor shall, at all times, exercise reasonable precautions for the safety of employees in the performance of this contract, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building and construction codes. The contractor shall also comply with the provisions of the Bureau of Reclamation publication, "Safety Requirements for Construction by Contract", in effect on date bids are opened, so far as

applicable, as determined by the contracting officer and unless such provisions are incompatible with Federal, State, or Municipal laws or regulations. Monthly reports of all lost time accidents shall be promptly submitted giving such data as may be prescribed by the contracting officer. Nothing in this paragraph shall be construed to permit the enforcement of any laws, codes or regulations herein specified by any except the contracting officer."

Paragraph 10 of the General Provisions provides:

"The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him."

Paragraph 11 of the General Provisions provides:

"The contractor shall, without additional expense to the government, obtain all licenses and permits required for the prosecution of the work. He shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work. . . ."

It is submitted that none of the quoted language can constitute an express indemnity between Merritt-Chapman & Scott Corporation and the Government, inasmuch as, as a general rule, one can obtain indemnity from his own negligence only in reliance upon language so clear and unequivocal as to demonstrate that such indemnification was the expressed intention of the parties. *Goldman v. Ecco-Phoenix Electric Corporation,* 41 Cal. Rptr. 73, 396 P.2d 377 (1964); *Hollingsworth v. Chrysler Corporation,* 208 A.2d 61 (Del. 1965); *Sinclair Oil and Gas Company v. Brown,* 333 F.2d 967 (5th Cir. 1964); *Donnelly v. Rochester Gas and Electric Corporation,* 44 Misc. 2d 855, 255 N.Y.

Supp. 2d 573 (App. Div. 1965); 42 CJS, *Indemnity,* Sec. 12; 27 Am. Jur., *Indemnity,* Sec. 15. As stated in *Goldman v. Ecco-Phoenix Electric Corporation,* supra,

> "We hold that one who seeks indemnification from his own negligence must draft the instrument in *specific, precise and unambiguous terms* . . ." (396 P.2d 377) (Emphasis added)

A far less persuasive minority view has been taken by certain courts in interpreting indemnity agreements so as to protect the indemnitee from the consequences of its own negligence. These courts do not require specific language of indemnity, but still require a clear manifestation of an intention by each party that the indemnitee shall be indemnified against his own negligence. Even in such jurisdictions, such agreements are:

> ". . . carefully scrutinized and strictly construed; they must clearly show the intention of one party to protect itself from claims arising from its own acts of negligence *and the intention of the other to assume the obligations.*" (*DeTinne v. F. N. Neilsen Company,* 45 Ill. App. 2d 231, 195 N.E. 2d 240 (Ill. App. 1963) (195 NE 2d 242) (Emphasis added)

Where, as in Illinois, express words of indemnification against the indemnitee's negligence are not necessary, still only language such as "(indemnity against) any and all claims for damages to persons, caused directly or indirectly or occasioned by the execution of the work included in this order" (*DeTinne v. Neilsen,* supra, 195 N.E. 2d at 242), or assumption of the "entire responsibility and liability for any and all damage or injury of any kind or nature whatever . . . to all persons . . . caused by, resulting from, arising out of, or occurring in connection with the execution of the work . . ." (*Gust K. Newberg Construction*

Co. v. Fischback, Moore and Morrissey, Inc., 46 Ill. App. 238, 196 N.E. 2d 513, 515 (Ill. App. 1964)) has been held to indemnify the indemnitee against his own negligence. The above-quoted language from the contract between the Government and Merritt-Chapman & Scott Corporation in no way approaches such language. (T.R. 12)

Concerning the Government's attempt to avoid the consequences of its own negligence by the language of contract, the rules stated in the recent case of *Cate v. United States,* 249 F.Supp. 414 (S.D. Ala. 1966) are particularly appropriate. In examining a Government contract to determine the effect of certain language relative to a Government claim of indemnity against a contractor, the court phrased its holding in the following language:

> "The clause upon which the government relies must then stand or fall in light of the rules of general law applicable to the construction of contracts of indemnity. It is stated that 'the indemnitor is entitled to have his undertaking as thus determined strictly construed, and that it cannot be extended by construction, or implication beyond the terms of the contract, especially where the contract was prepared by the indemnitee.' 42 C.J.S., *Indemnity,* § 8(b), p. 576 (1944). The contract here was written by the Government and is contained within a portion of the contract dealing with payments thereunder. 'It is the general rule that where the indemnity is not contracted for from an insurance company whose business it is to furnish indemnity for a premium under a contract, but is from one not in the indemnity business and as an incident of a contract whose main purpose is something else, the indemnity provision is construed strictly in favor of the indemnitor.' (Citing cases) . . . 'unless the intention is unequivocally expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own neg-

ligence.' Applying the foregoing principles, it cannot be said that the clause in this case, when taken in its proper context, contains positive indicia of intent to indemnify the government for the consequences of its own negligence." (249 F.Supp. 417, 418)

Absent language requiring an express indemnity, the language of *Halstead v. Norfolk and Western Railway*, supra, p. 21 becomes particularly appropriate:

". . . We find no language in the tariff which could be reasonably interpreted to impose upon a consignee an indemnity liability to the carrier for accidental injury to consignee's employee where such employee is covered by Workmen's Compensation and where, as in West Virginia, the act insulates the employer from common law liability therefor." (236 F. Supp. 189)

It should be noted with reference to the quoted language that the Arizona exclusive liability statute, A.R.S. 23-906, similarly exempts employers complying with the statutes from damages at common law arising on account of injuries to their employees.

In discussing the contractual relationship between an employer and a third party seeking indemnity, the Tenth Circuit in *Hill Lines, Inc. v. Pittsburgh Plate Glass Company*, 222 F.2d 854 (10th Cir. 1955) stated:

"The most that can be said of Hill Lines' theory is that by virtue of the contractual relationship between Hill Lines and Pittsburgh with respect to unloading the truck, Pittsburgh became solely liable to its employee for his injuries. The answer is that if Pittsburgh is either solely or jointly liable for those injuries its liability is limited by the Workmen's Compensation Act. The result is the same. In either event, the Workmen's Compensation law operates to insulate Pittsburgh from liability to Hill Lines." (Emphasis added) (222 F.2d 857-858)

It is important in reading Paragraph 10 of the General Conditions concerning "accident prevention" to consider the entire condition, rather than extracting excerpts from same. Initially, it can be forcefully argued that if the language of the paragraph renders Merritt-Chapman & Scott Corporation liable to provide for the safety of its employees, it has embraced this obligation and provided Workmen's Compensation coverage to provide for same, and that this liability is limited by the provisions of the Workmen's Compensation Act (applying the reasoning of the *Hill Lines* case).

Furthermore, the accident prevention provision does not require the contractor to prevent employee accidents, but only requires that reasonable precautions be taken against same. By the very terms of the accident prevention provision contained in General Condition 10:

> "Nothing in this paragraph shall be construed to permit the enforcement of any laws, codes or regulations herein specified by any except the contracting officer." (T.R. 12)

Not only is there no indemnity contained in the quoted language, there is no language in the provisions indicative of any specific duty; the foregoing provisions concerning accident prevention are merely general safety provisions as applied to Merritt-Chapman & Scott Corporation, just as the safety role of the Government was a general one giving rise to no specific duty. A goal of accident prevention, whether considered relative to the liability of the Government or relative to the liability of Merritt-Chapman & Scott Corporation, is not a sufficient basis upon which to predicate liability. (See *Kirk v. United States,* supra, p. 5, and argument thereon, pp. 5-10.)

F. THE CONTRACT BETWEEN THE GOVERNMENT AND MERRITT-CHAPMAN & SCOTT CORPORATION CANNOT BE CONSTRUED SO AS TO GIVE RISE TO AN IMPLIED WARRANTY INDEMNIFYING THE GOVERNMENT AGAINST ITS OWN NEGLIGENCE.

The Government, recognizing there is no express indemnity upon which to found the third party complaint has attempted to construct one from the contract by reference to *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,* 350 U.S. 124, 76 S. Ct. 232, 100 L.Ed 133 (1955). In the Government's motion to strike the Third Party Defendant's defenses, the Government said at page 6:

> "In the landmark case of Ryan . . ., the Supreme Court held that contractual agreements similar to this one although without an indemnity provision as herein contained amount to a 'contractual undertaking' to perform the special work with reasonable safety, and to discharge 'foreseeable damage resulting to (contractee) from the contractor's improper performance of those requirements.'" (T.R. 22)

Before analyzing Ryan to determine if it is applicable here, it is to first be noted that this decision was a divided one by the court, carrying with the minimal margin, five to four. The Chief Justice, Warren joined with Justice Black, Douglas and Clark in dissenting, in an opinion written by Justice Black.

Likewise, in a subsequent opinion, *Italia Societa v. Oregon Stevedoring Company,* 376 U.S. 315, 11 L. Ed. 2d 732, 84 S. Ct. 748 (1964), upon a similar subject, violent dissent again appeared. There, the decision was six to three notwithstanding the prior and apparently controlling decision in Ryan.

In innumerable cases citing Ryan, it has become readily clear that the principles of Ryan apply only to maritime situations. The very language of the majority opinion in the *Italia Societa* case, supra, makes this clear. There the Court said:

"Both sides press upon us their interpretation of the law in regard to the scope of warranties in non-sales contracts, such as contracts of bailment and service agreements. *But we deal here with a suit for indemnification based upon a maritime contract, governed by Federal law* (citing authority), *in an area where rather special rules governing the obligations and liability of ship owners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents.* By placing the burden ultimately on the company whose default caused the injury, (citing authority) we think our decision today is in furtherance of these objectives." (11 L. E. 2d 741) (Emphasis added)

Regardless of the method of reasoning as to how the court arrived at its decision in Ryan, the ultimate conclusion of the majority was that the stevedoring company, the employer and Third Party Defendant, had breached a contractual warranty to the Defendant shipowner, which gave rise to the indemnity. The court said at 100 L. Ed. 140:

"The Act nowhere expressly excludes or limits a shipowner's right, as a third person, to insure itself against such a liability either by a bond of indemnity, or the contractor's own agreement to save the shipowner harmless."

The court went on to amplify:

"In the face of a formal bond of indemnity this statute clearly does not cut off a shipowner's right to recover from a bonding company the reimbursement that the indemnitor, for good consideration, has expressly contracted to pay. Such a liability springs from an independent contractual right."

"The shipowner's action here is not founded upon a tort *or upon any duty which the stevedoring contractor owes to its employee.* The third party complaint is

> grounded upon the contractor's breach of its purely consensual obligation *owing to the shipowner* to stow the cargo in a reasonably safe manner. Accordingly, the shipowner's action for indemnity on that basis is not barred by the Compensation Act." (Emphasis added)

The court then described the agreement it had construed to exist in Ryan as follows:

> "This obligation is not a quasi-contractual obligation implied in law or arising out of a non-contractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's *warranty* of workman like service that is *comparable to a manufacturer's warranty* of the soundness of its manufactured product." (100 L. Ed. 142) (Emphasis added)

Let us now consider whether the contract provisions with Merritt-Chapman & Scott Corporation fall within the purview of the warranty discussed in Ryan.

First of all, the General Provisions Section 11 sentence states:

> "He (the contractor) shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work." (T.R. 12)

Wherein is there any warranty here? Wherein is there any duty or obligation running to the Government? There is but one; had the contractor damaged property of the Government through "fault or negligence" the contractor would have been "responsible" for the "damages" to the "property". As pointed out explicitly by Ryan, the doctrine therein announced does not apply to the tort of the alleged indemnitor, only to "breach" of the warranty.

The same reasoning applies to the language of section 10 of the General Conditions:

> "The contractor shall, at all times, exercise reasonable precautions for the safety of employees in the performance of this contract, and shall comply with all applicable provisions of Federal, State and municipal safety laws and building and construction codes." (T.R. 12)

Can any warranty such as a manufacturer's warranty running in favor of the Government be established here? In Ryan, safe storage of cargo, for which the Defendant shipowner was absolutely an insurer, was being protected by the warranty; but in the instant case there is nothing but torts toward persons, third parties to the contract, being described.

It would be much too lengthy to explore the background of the Ryan decision. However, we can cite the court to two Supreme Court opinions which preceded Ryan and one which followed Ryan that make it expressly clear the limited effect which Ryan should have, notwithstanding certain of its language which, taken out of context, might seem more broad than it truly is. In order to more fully understand Ryan the following cases should be read in the following order: *Halcyon Lines v. Haenn Ship C & R Corp.*, 342 U.S. 282, 96 L. Ed. 318, 72 S. Ct. 277 (1952); *Pope and Talbot, Inc. v. Hawn, supra,* p. 23; *Weyerhaeuser S.S. Co. v. U.S.*, 372 U.S. 597, 10 L. Ed. 2d 1, 835 S. Ct. 926 (1963).

In Halcyon, the first of the three, the Plaintiff was an employee of a ship repair firm. Indemnity was not sought by the shipowner from the employer, only contribution. (Contribution would have been applicable had Plaintiff been a longshoreman or a seaman.) The Supreme Court held there was no right to contribution except by legislation and they would leave it up to the legislature to change. In the second of the three cases, Hawn, the Plaintiff was again an employee of a ship repairing firm and sued the shipowner.

By third party practice the shipowner sought *contribution or indemnity* from the employer. The court held in language previously quoted at page 24 herein:

> "Pope & Talbot's (the shipowner seeking indemnity) contention if accepted would frustrate this purpose to protect employers who are subject to absolute liability by the Act. Moreover, reduction of Pope & Talbot's liability at the expense of Haenn (the employer) would be the substantial equivalent of contribution which we declined to require in the Halcyon case." (98 L. Ed. 152)

And the court held there could be neither contribution *nor* indemnity.

The third of these three cases, Weyerhaeuser, followed Ryan, and dealt with a plaintiff seaman, employed by the United States, who brought suit against Weyerhaeuser by virtue of a two-ship collision. Weyerhaeuser brought in the United States as a Third Party Defendant, relying on Ryan. The Supreme Court, in considering the effect that Ryan had upon the situation there presented, stated that the Federal Employees Compensation Act language (being considered in Weyerhaeuser) was identical to the language of the Longshoremen's and Harbors Workers' Compensation Act considered in Ryan (10 L. Ed. 2d 5). The court there described the language of the Act as follows:

> "Section 7(b) provides that the compensation remedy shall be exclusive with respect to the Government's liability 'to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States. . . .' The Government points out that the general words 'anyone otherwise entitled to recover damages' literally would cover a shipowner entitled to recover divided damages after a mutual fault collision. But the general language upon which the Government relies

follows explicit enumeration of specific categories, employees, their representatives, and their dependents. Under the traditional rule of statutory construction which counsels against *giving to general words a meaning totally unrelated to the more specific terms of a statute, we think the meaning of the statutory language is far from 'plain'." (10 L. Ed. 2d 4)

The court went on to say that under the interpretation of the Federal Employees Compensation Act and under the interpretation of the Longshoremen's and Harbor Workers' Compensation Act:

"There is no evidence whatever that Congress was concerned with the rights of unrelated third parties, *much less of any purpose to disturb settled doctrines of admiralty law affecting the mutual rights and liabilities of private shipowners in collision cases.*" (10 L. Ed. 2d 5) (emphasis added)

It is readily apparent that the court has construed the federal statutes so as to limit the action against the employer to eliminate only those actions against the employer brought by the employee, his representatives and his dependents, because the enumeration of these parties appeared in the statute. This is certainly not the construction that can be given the Arizona Workmen's Compensation Act. The Arizona Workmen's Compensation Act does not even speak of who may bring the action against the employer. It deals only with the obligation of the employer. Section 23-906 A.R.S. states:

"Employers who comply with the provisions of Section 23-961 as to securing compensation *shall not be liable for damages at common law or by statute,* except as provided in this section, for injury or death of an employee wherever occurring, . . ." (Emphasis added)

It is to be emphasized that Section 23-1022 A.R.S., a separate statute, deals with the remedies of the employee and accordingly, the two statutes are to be distinguished, one dealing with the remedy of the employee and the one quoted above dealing with the obligations of the employer.

It should therefore be readily apparent that the analysis of the statutes in Ryan and Weyerhaeuser cannot apply to the Arizona Workmen's Compensation statutes and the employer in Arizona who complies with the terms of the Workmen's Compensation Act should not be liable to any third party on a claim of indemnity.

Similarly, a brief review of recent cases not reaching the Supreme Court reveals that the rule of the Ryan case is limited to admiralty cases.

In *Waterman Steamship Corporation v. David,* 353 F.2d 660 (5th Cir. 1965), the court recognized the unique rules which apply to maritime situations. The court said:

> "The stevedore's 'warranty of workmanlike service is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service.' Ryan, 350 U.S. at 133, 76 S.Ct. at 237. In a more recent case the Supreme Court, declining to take a bailment approach, (citing *Booth S.S. Co. v. Meier and Oelhaf Company,* 262 F.2d 310 (2nd Cir. 1958)), again noted that the considerations underlying the stevedore's warranty are the same as those which 'underlie a manufacturer's or seller's obligation to supply free of defects.' (citing authority) In Griffith's case, allowing indemnity, the Supreme Court held that 'the absence of negligence on the part of a stevedore who furnishes defective equipment is not fatal to the shipowner's claim of indemnity based

> on the stevedore's implied warranty of workmanlike service.' The Court said: 'Although in Ryan the stevedore was negligent, he was not found liable for negligence as such but because he failed to perform safely, a basis for liability including negligent and non-negligent conduct alike . . . Liability should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury.' 376 U.S. at 319, 84 S. Ct. at 751" (353 F.2d 664)

This court, in *Huff v. Matson Navigation Company,* 338 F.2d 205 (9th Cir. 1964), has recognized the application of the principles enunciated in the Ryan case to maritime situations. Said the court:

> There is another line of related decisions by the Supreme Court which, when considered with those to which we have just referred, disclose that the Court has been in the process of *molding rules in admiralty* calculated to provide increased protection for longshoremen engaged in this hazardous occupation." (Citing authority, including Ryan, and Italia Societa.) (338 F.2d 210) (Emphasis supplied)

Quoting freely from the Italia Societa case, the court continued:

> "The Court there (in the Italia Societa case) also expounded the rationale of this whole series of cases as follows: (376 U.S. p. 324, 84 S. Ct. p. 754) 'Where the shipowner is liable to the employees of the stevedoring company as well as its employees for failing to supply a vessel and equipment free of defects, regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment supplied by a stevedore in furtherance of its contractual obligations. . . . We deal here with . . . an area where rather special rules governing the obligations and liability of shipowners prevail,

rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents. By placing the burden ultimately on the company whose default caused the injury, (citing authority) we think our decision today is in furtherance of these objectives'. These objectives were stated in footnote 10, page 323 of that opinion, 84 S. Ct. at page 753, by quoting from DeGioia v. United States Lines, 2d Cir., 304 F2d 421, 426 as follows: 'The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions best able to minimize the particular risk involved." (338 F.2d 211)

That the rule of the Ryan case does not extend beyond the maritime context is clearly pointed out in *Halstead v. Norfolk and Western Railway Company,* supra, p. 21, wherein the court said:

"Under such circumstances, the Moretz case and the cases cited therein in support thereof, notably Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133, afford no basis in law for a recovery under the facts of this case. In the Ryan case, the court found that the stevedoring company's agreement to perform stevedoring operations contained, of its essence, an agreement to indemnify the shipowner of the stevedoring company's service contract to stow the cargo properly and safely was not lived up to. *There, under maritime and admiralty law, where the historic rule of divided damages prevails, the court found a contract of indemnity to exist.* Here, however, no such rule prevails and N & W concedes, in its brief, the lack of express language creating a contract of indemnity; but it would, nevertheless, fashion one by implication from the relationship of

the parties with the aid of the statutes, rules and regulations applicable to rail carriers, hereinabove referred to. This theory necessary must bear close scrutiny, for to apply it to Black Rock would, in its effect, be forcing Black Rock to pay twice for the same industrial accident. Black Rock having already paid its contribution to the Workmen's Compensation Fund and the plaintiff having received the benefits thereof, before fostering a further economic burden on Black Rock, for the same industrial accident to its employee, its legal responsibility therefore must be made to clearly appear. Under such circumstances, it will not suffice to say, as N & W does here, that Black Rock is due to respond over simply because its employee was injured while engaged in the performance of an essential aspect of its business. . . ." (236 F. Supp. 187) (Emphasis added)

When asked to apply the Ryan rule to non-maritime situations, the 5th Circuit, applying Florida law, expressly limited the Ryan rule to maritime cases. In *General Dynamics Corporation v. Adams,* 340 F.2d 271 (5th Cir. 1965), the court said:

"We are here concerned with the Florida rule with respect to the right of indemnity for, while the right of proceed in a third party action is established by Federal rule, such right depends upon the existence of a state created liability. *Thus, the Supreme Court decisions in Maritime cases,* (citing Ryan, Weyerhaeuser and others) *recognizing the right of a shipowner to recover against a stevedoring company when successfully sued by an employee of the stevedoring concern, are not in point here.* Those cases deal principally with the non-delegable duty of a shipowner to maintain a seaworthy vessel, the breach of which makes him liable without proof of negligence. In each of the cases the act of the stevedoring firm against which the Supreme Court permitted the third party

action to proceed, constituted the element of unseaworthiness which fastened the vicarious liability on the shipowner." (340 F.2d 279, 280) (Emphasis added)

The court disallowed a third party claim against the employer of the injured parties.

In *Reid v. Royal Insurance Company,* 80 Nev. 137, 390 P.2d 45 (1964), again the court considered the extension of the Ryan doctrine beyond the maritime context, and refused to so extend the doctrine. Said the court:

> "*We hold that the doctrine of the Ryan case, having its origin in and being applied for the most part to maritime cases, should not be extended to the present situation.* Accordingly, we hold that under the circumstances of this case, the contractor does not have a claim for relief against the subcontractor on the theory of indemnity implied in law. The confusion as to when the indemnity rule announced in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., supra, should be applied may be illustrated by a few citations. In Weyerhaeuser S.S. Co. v. Nacirema Co., supra, the unanimous opinion of the United States Supreme Court said: 'The question here involves the right to trial by jury *under principles of maritime liability enunciated in Ryan* . . . (Emphasis supplied)" (390 P.2d 49)

It is clear that the rule in the Ryan case applies only in admiralty cases, and that such rule is not at all applicable to the present controversy.

CONCLUSION

In summary it can be readily recognized:

(1) If there is no duty owed by the Government to the Plaintiffs, Merritt-Chapman & Scott Corporation, in addition to the Government, is entitled to judgment.

(2) If there is a duty owed by the Government to the Plaintiffs, such duty must be based upon negligence of the Government, for which there can be no indemnity from Merritt-Chapman & Scott Corporation.

For the reasons set forth herein, the District Court erred in granting the motion to strike Merritt-Chapman & Scott Corporation's "additional defenses" to the third party complaint of the Government, and in failing to enter judgment on behalf of Merritt-Chapman & Scott Corporation in the third party complaint.

Respectfully submitted,

O'Connor, Cavanagh, Anderson,
Westover, Killingsworth & Beshears

By John H. Westover
Attorneys for Merritt-Chapman & Scott Corporation

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John H. Westover